QUESTION PRESENTED

The question involves the 8th Circuit Court of Appeals' failure to recognize that Appellant's administrative claim properly gave notice of the continuing negligence theory which was to be employed in the Petitioner's cause of action filed with the Federal Bureau of Prisons. The Eighth Circuit Court of Appeals' determination that medical malpractice that was associated with the amputation of the Petitioner's leg initiated the two year statute of limitation under 28 U.S.C. §2401(b) (Federal Tort Claims Act) and that the statutes of limitation was not tolled by the continuing treatment doctrine was not correct in that the statute of limitation should have been tolled by the continuing treatment doctrine while there is ongoing treatment of a patient. This determination that the statute was not tolled by the Eighth Circuit Court of Appeals is in conflict with, most notably, the Second and Fourth Circuit Courts of Appeal who have held that the statutes of limitation under 28 U.S.C. §2401(b) was tolled while there is continuing medical treatment of the patient.

LIST OF PARTIES

The Plaintiffs/Appellants in the proceeding below were the Plaintiff, Steven McCoy, a person who was incarcerated in a federal medical facility in Springfield, Missouri. The United States was is the Defendant/Appellee below and the Respondent herein. The attorney for the United States is Earl W. Brown, III, Assistant United States Attorney, 901 St. Louis Street, Suite 500, Springfield, Missouri 65806.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Steven McCoy, Plaintiff below, respectfully prays that the Court issue a Writ of Certiorari to review the opinion of the Eighth Circuit Court of Appeals in *Steven McCoy v. United States of America*, No. 00-1375.

OPINIONS BELOW

The opinion of Eighth Circuit Court of Appeals reported at 264 F.3d 792 (8th Cir. 2002) and reprinted in the Appendix ("App.") at App. p. 13. The District Court's Order on the Summary Judgment Motion is unreported and reprinted in the Appendix at App. p. 10. The order denying the Motion for Rehearing en banc is unreported and reprinted in the Appendix at App. p. 33.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§1331 and 28 U.S.C. §2401(b), Respondent brought suit in the United States District Court for the Southern District of Missouri. On December 8, 1999, the Court, at first, rejected Respondent United States' Motion for Summary Judgment. Approximately one month later the Court reversed itself and granted the Respondent United States'

Motion for Summary Judgment based on the theory that McCoy's claim was time barred since McCoy had filed his administrative claim more than two years after the amputation of his leg at the Springfield Federal Medical facility, which exceeded the statute of limitation under 28 U.S.C. §2401(b). (App. pp. 12-14.) The Petitioner McCoy filed an appeal with the Eighth Circuit Court of Appeals arguing that the administrative claim was timely because the statute of limitations had been tolled by the continuing treatment doctrine. The Eighth Circuit Court of Appeals disagreed and affirmed that the District Court had not abused its discretion in determining that the statutes of limitation had expired. (App. pp. 1-20.)

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves interpretation of the Federal Tort Claims Act located at 28 U.S.C. §2675(a).

STATEMENT OF CASE

This case concerns the proper interpretation of the continuing treatment doctrine as it applies to the tolling of the two year statute of limitations at 28 U.S.C. §2401(b).[1] This is key to the ability of the Petitioner McCoy to proceed on his claim against the United States for the Federal Tort Claims Act (hereinafter "FTCA"). This Supreme Court has held that the FTCA claim for medical malpractice accrues when a plaintiff becomes aware of his injuries and its probable cause. See *United States v. Kubrick*, 444 U.S. 111, 122-123 (1979). The District Court found that McCoy's claim was barred by statute of limitations contained in §2401(b) because McCoy knew of the government's breach of duty as soon as his leg was amputated. (App. p. 18.)

The Petitioner, Steven McCoy (hereinafter McCoy), was

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[1] 28 U.S.C. §2401(b) provides that:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

confined in federal prison from June 25, 1996 through April 16, 1999.[2] On January 29, 1999, Mr. McCoy filed a Federal Tort Claims Act (hereinafter FTCA) claim against the United States. In his claim, McCoy alleged that his right leg was amputated on January 23, 1997 and that he had been mis-diagnosed and mistreated for severe peripheral vascular disease and osteomyelits because of an infection he had developed in June of 1996. (App. pp. 3-6.)

McCoy was seen in June of 1996 by B. Ezaz, M.D., complaining of foot lesions. He was treated with antibiotics and anti-inflammatory agents. After Mr. McCoy was transferred to FSI at Allenwood, Pennsylvania in August of 1996 he was treated at that institution with antibiotics and dressing changes by, and under the directions of, R. Migliorno, D.O. (clinical director of the institution's medical facilities.) During the course of his treatment at Allenwood, and in approximately October of 1996, Mr. McCoy was seen by

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[2] (1) FMC Fort Worth, Texas (June 25, 1996 through July 19, 1996); (2) Oklahoma City, Oklahoma (July 19, 1996 through August 6, 1996); (3) SCI, Allenwood, Pennsylvania (August 6, 1996 through January 21, 1997); (4) USMCFP. Springfield, Missouri (January 21, 1997 through December 16, 1997); (5), SCI, Allenwood, Pennsylvania (December 16, 1997 through March 2, 1998); and (6) USMCFP, Springfield, Missouri (March 2, 1998 through April 16, 1999).

James W. Morgan, M.D., a surgeon at Lewisburg, Pennsylvania. (App. p. 4.)

On January 21, 1997, Mr. McCoy was transferred to the United States Medical Center for federal prisoners in Springfield, Missouri. After arrival at the Medical Center, Mr. McCoy came under the care of Dr. M. H. Choudhury, M.D. at the Surgical Center. He was treated by various doctors and for various conditions, including vascular disease. (App. pp. 5-6.) At the time Mr. McCoy had dark discoloration and a blistering ulceration with shivering as a result of gangrene of his left lower extremity. He was admitted to in-patient service by Dr. Choudhury and signed the consent form for the amputation of the leg. On January 23, 1997, the left lower extremity was amputated by Dr. Harris at the United States Medical Center for federal prisoners in Springfield, Missouri. (App. pp. 5-6.) Subsequent to the amputation, Mr. McCoy was repeatedly treated because the stump wound would not heal. He had a number of additional surgeries to close the wound, to attempt skin graphs and a bone resection. (App. p. 15.) In March of 1997, three months after the surgery and years after unsuccessful treatment for vascular

disease, the doctors began to suspect Buerger's disease. The doctors finally informed Mr. McCoy of this suspicion in April of 1997. Mr. McCoy was never told to stop smoking, which is the only treatment for Buerger's disease. (App. 16.) Mr. McCoy was seen and treated on a regular basis for conditions relating to his amputation by the physicians at the Surgical Center until his release.

The Eighth Circuit affirmed the District Court's decision and held that McCoy's administrative claim filed with the government had failed to raise the issue of continuing negligent treatment of the administrative claim. (App. p. 18.) Thus, the Eighth Circuit ruled that the continuing treatment doctrine enunciated *Wehrman v. United States*, 830 F.2d 1480 (8th Cir. 1987) was inapplicable because the continuing treatment doctrine will only toll the statutes of limitation under 28 U.S.C. §2401(b) if the tortious conduct was of a continuous nature. (App. p. 18.) The Eighth Circuit Court of Appeals also declined to accept a different version of the continuing treatment doctrine which had been adopted in the Fourth and Second Courts of Appeal in the cases of *Otto v. Nat'l Inst. of Health*, 815 F.2d 985 (4th Cir. 1987) and *Ulrich v. Veterans Admin. Hosp.*, 853

F.2d 1078 (2nd Cir. 1988). (App. pp. 17-18).[3]

The theories adopted by the Courts of Appeal in *Otto* and *Ulrich* do not require that the entire course of the treatment be negligent to toll the statute of limitations, but only some portion of the treatment to be negligent. *Otto v. Nat'l Inst. of* Health, 815 F.2d *supra* at 987. This version of the doctrine permits a wronged patient to benefit from his physician's corrective efforts without disruption of the malpractice suit. *Id.* at 989. See also *Ulrich v. Veteran's Administration Hospital*, 853 F.2d *supra* at 1080-81. The decision of the Eighth Circuit Court of Appeals was filed with a dissent by the Honorable McMillian who argued that the administrative claim made by the Petition was sufficient to put the federal government on notice of the Petitioner's claim and that the statutes of limitation should have been tolled by the continuing treatment doctrine. (App. pp. 20-32.)

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[3] The Eighth Circuit Court of Appeals specifically noted that there was a "split in the Circuits." The Court noted, "The continuous (or continuing) treatment doctrine will, in certain cases, toll the statutes of limitation during the course of treatment. There are two variations of the continuing treatment doctrine in use in the Circuits." (App. p. 19.) The Ninth Circuit Court of Appeals is in agreement with the Eighth Circuit Court of Appeals in that the claim under FTCA arises when the patient learns or should have known of the medical malpractice. See *Ashley v. United States*, 413 F.2d 490, 492 (9th Cir. 1969).

A motion for rehearing en banc was filed arguing that the administrative claim had included a continuous negligent treatment claim and that the Eighth Circuit should accept the rationale adopted in the *Otto* and the *Ulrich* cases, *supra.* The motion for rehearing en banc was denied with three dissents. (App. p. 33.)

The first basis relied on by the Circuit Court of Appeals to deny Mr. McCoy's claim was that he did not raise an issue of "continuing" negligent treatment in his administrative claim. (App. pp. 17-18.) In his administrative claim, McCoy asserted that physicians for the United States federal prison in Springfield were negligent in the treatment of Mr. McCoy's ailment in a number of ways:

> The loss of Mr. McCoy's left leg was directly caused by the negligence of agents and/or employees of the United States including but not limited to the following individuals who began treating Mr. McCoy on or about June 25, 1995; Robert Migliorino, D.O., B. Ezaz, M.D., Robert Manenkoff, P.A., Jim Parush, P.A., D. Krout, L.P.N., Bhatti, P.A., B. Nwankno, P.A., Kevin Welsh, M.D., as well as others. Said

medical providers were negligent in the treatment of Mr. McCoy in one or more of the following respects:

A. They failed to appreciate the seriousness of Mr. McCoy's left heal lesion and treat it in a timely and adequate fashion.

B. They failed to treat Mr. McCoy's pre-existing peripheral vascular disease when they knew or should have known of its presence from prior medical records and treatment.

C. Failed to timely order an arteriorgram, doppler test or other tests which would have revealed the presence of significant peripheral vascular disease at a point in time where said disease was still treatable.

D. The failed to read or appreciate the significance of Mr. McCoy's history including his preexisting peripheral vascular disease which resulted in the loss of his right leg.

E. Failed to refer Mr. McCoy to a specialist in

> vascular disease and other specialist in a timely manner when they knew or should have known that Mr. McCoy was in need of treatment from a vascular specialist and that further testing was indicated. (Emphasis added). (App. p. 6.)

As is noted in the dissent, an administrative claim under the FTCA need to do no more than provide sufficient information to allow an agency to administratively process the claim. (App. p. 23.) See *Dundon v. United States*, 559 F.Supp. 469, 477 (E.D. N.Y. 1983). The failure for McCoy to include a single word ("continuing") should not have been used to bar a cause of action that would compensate a person for negligent care that resulted in the amputation of his leg. McCoy's administrative claim noted that doctors failed to appreciate the seriousness of his condition, failed to treat the pre-existing peripheral vascular disease and failed to understand the significance of Mr. McCoy's medical history. The administrative claim is evidence that McCoy was claiming that the failure to diagnose and to adequately treat his peripheral vascular disease was a tort of a continuing nature. (App. pp. 5-6.) The

administrative claim is adequate to put any party on notice that continuing negligence is being alleged. Even the rejection by the regional counsel of the Federal Bureau of Prisons, Henry J. Sadowski, noted that the claim alleged "substandard medical treatment resulting in the amputation of Mr. McCoy's left leg." (App. p. 23.) Under the broader standards of "notice pleading" in the federal judiciary, this administrative claim provides adequate notice of the cause of action being alleged.[4] In McCoy's administrative claim the ongoing nature of negligence was alleged and the agency had sufficient notice to respond to the claim.

The Eighth Circuit Court of Appeals held that the continuing treatment doctrine did not toll the statute of limitations under the rules used in *United States v. Kubrick*, 444 U.S. 111 (1979) and *Reilly v. United States*, 513 F.2d 147 (8th Cir. 1975). The Court believed that the continuing treatment doctrine did not apply if "the

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[4] Even under the stricter requirements of a "fact pleading" jurisdiction, such as Missouri, one only has to allege specific acts with "sufficient certainty to advise a defendant of what charges to meet" and then "avers that the act was negligently done" to survive a motion to dismiss. See *Phillips v. Carroll*, 379 S.W.2d 143, 145 (Mo. App. E.D. 1964). McCoy administrative claim alleged a series of acts that were performed negligently.

claimant is aware of the acts constituting negligence." (App. p. 19.) McCoy alleged that the treating physician and other medical personnel failed to properly diagnose and treat his peripheral vascular disease. There is no evidence in the record that he knew or should have known the doctor was not treating him correctly. In fact, as noted by the dissent, a note in the hospital file indicated that the Appellant was satisfied with the treatment. (App. p. 23.) These acts of negligence had a number of consequences, the most severe of which was the amputation of McCoy's left leg. But the amputation was not the only consequence of the malpractice that McCoy suffered. McCoy alleged that his doctors continued to mistreat McCoy by a failure to timely diagnose and successfully treat the vascular disease commonly known as Buerger's disease, which resulted in three further operations on the stump of his amputated leg. Medical personnel did not even advise McCoy to stop smoking, the most rudiment and basic treatment of his ailment. (App. p. 16.) To conclude that when his leg was amputated Mr. McCoy had knowledge that he was suffering from peripheral vascular disease is not consistent with the record before the District or the Circuit Court.

The District Court and the Circuit Court focused only on the amputation and gave *Kubrick v. United States*, *supra* a narrow and crabbed interpretation. The obvious burden for such a rigid application the *Kubrick* "discovery doctrine" places on a layman is obvious. It proposes a role reversal for McCoy and his doctors. Subtleties of symptoms of an ailment like peripheral vascular disease can make the incompetent treatment of the patient difficult, if not impossible, for the patient to recognize. Slow healing wounds may have other causes.

In its opinion in chief the Circuit Courts of Appeal relied on *Reilly v. United States* to affirm the District Court's determination that McCoy knew of his doctor's breach of duty as soon as his leg was amputated. (App. p. 19.) As noted by Judge McMillian in the dissent in this opinion, the *Reilly* case should be used to support the application of the continuing treatment doctrine to toll the FTSC's statute of limitation:

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> Rather, the rule [the continuing treatment doctrine] is premised on the notion that a person should not be required

> to investigate the cause of his injuries or to bring suit while receiving necessary treatment for the injuries. The interest in preventing stale claims convinces us that this rationale for the rule has no merit when a person knows of the acts constituting negligence. In this situation little, if any, investigation is necessary to determine whether a meritorious cause of action exists. A different situation is posed, however, when a person does not know of the acts constituting negligence. Under these circumstances the rationale for the continuous treatment test has value in determining the exercise of reasonable diligence to discover the acts constituting negligence. In the case sub judice there exist factors in addition to continuous treatment which necessary enter into a determination of reasonable diligence.

(App. p. 31) (underscored text cited in *Reilly*) citing *Tyminski v. United States*, 481 F.2d 257, 265 ct.n.5 (3rd Cir. 1973).

Judge McMillian went on to note:

> Thus, even though the language used in *Reilly* to reject applying the continuing treatment doctrine refers to the

> tolling of the running of the statute of limitations, the analysis actually refers to the accrual of the cause of action because that is the context in which the continuing treatment doctrine is discussed in both *Reilly* and in *Tyminski*, the case upon which it relies.

(App. p. 31.)

As is so succinctly put by Judge McMillian, there is nothing in *Reilly* which would prohibit the tolling of the FTCA in light of the continuing negligent treatment of McCoy.

It is believed that *Wehrman v. United States*, 830 F.Supp. 1480 (8th Cir. 1987) applies directly to the facts in this case. In *Wehrman*, a patient was incompetently treated for 22 years by various "agents, servants and employees of the Veteran's Administration." *Id.* at 1482. The medical personnel of the hospital had always advised against surgery for these conditions. *Id.* Finally, the Appellant sought outside advice and surgery was performed. Surgery was successful and the Appellant sued. The Court held that even though *Wehrman* was treated by a number of different physicians over his 22 year period, the statute of limitation was tolled

on his cause of action because of the continuing treatment doctrine. *Id.* at 1484-1485. In fact, under the continuing treatment in this case, Plaintiff's cause of action did not accrue until the tortious continuing treatment ended. *Id.* at 1483.

Furthermore, the reversal of this decision in this case would also remedy a conflict between the two variations of the continuing treatment doctrine in the federal circuits between the Eighth, and most notably, the Fourth and Second Circuit Courts of Appeal. In *Otto v. Nat'l Inst. of Health*, 815 F.2d 985 (4th Cir. 1987) and *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078 (2nd Cir. 1980) the Circuit Courts of Appeal held that the continuing treatment doctrine is not limited to continuing negligent treatment. As noted by the Court in *Otto*:

> Under the doctrine, the patient is excused from challenging the quality of care being rendered until the confidential relationship terminates. *Brown v. United States*, 353 F.2d 578, 580 (9th Cir. 1965). Stated another way, the doctrine permits a wronged patient to benefit from his physician's corrective efforts without the disruption of a malpractice

action.

Otto v. Nat'l Inst. of Health, 815 F.2d *supra* at 988.

In this case the Eighth Circuit Court of Appeals relied on the fact that McCoy allegedly knew of the "negligence" as soon as his leg was amputated. (App. p. 17). Such a circumstance requires the assumption that a patient can be versed in the medical arts sufficiently to interpret his treatment to determine if the care he received is negligent. As noted by the Court:

> The second rationale for the doctrine holds its absurd to expect a patient being treated by a doctor or hospital to interrupt corrective treatment by instituting suit against either while under their continuing care. The patient's relationship with those caring for him is based upon trust in their medical skills. Where corrective treatment is needed, it often would be so plainly contrary to the patient's own interests in his cure and recovery to disrupt his relationship by serving a summons and complaint on those caring for him as to make the requirement to sue nonsensical. (citations omitted.)

Ulrich v. Veterans Admin. Hosp., 853 F.2d *supra* at 1081.

In the present case, the Petitioner presented to the District Court and Circuit Court of Appeals evidence, in the form of medical records, that Petitioner did not know that his treatment was negligent even in light of the previous amputation.

The Eighth Circuit determination that the statute of limitation is not tolled by the continuos treatment doctrine if the patient is assumed to know the treatment is negligent is inconsistent and, it is respectfully submitted, illogical in light of the burden it places on the Petitioner. Many persons are diagnosed for illnesses or other conditions of their health for which the duration of treatment is many months or years. In the present case, the Petitioner was treated by the physicians at the Springfield Medical facility for at least fourteen months after his amputation. The Petitioner did not know and was not treated for a vascular disease (Buerger's disease) before the amputation. The physicians treating Mr. McCoy did not tell him he had Buerger's disease even after he was diagnosed some three months after the amputation. The physicians finally told Mr. McCoy in April of 1997 that he had this vascular disease. (App. p.

16.) This failure to diagnose and properly treat does not begin and end with the amputation of his leg in January of 1997. The failure to diagnose and to treat the disease before and after the amputation are inextricably intertwined as part of his complete treatment for this disease. At the very least, the statute of limitations should be tolled until the existence of the disease was finally disclosed to Mr. McCoy, in April 1997. As noted in the administrative claim and Petition, Mr. McCoy has alleged that the treatment included the failure to diagnose the disease and treat it before and after the amputation. The continuing treatment doctrine should apply to toll the statute of limitations at least to the date when Mr. McCoy was properly diagnosed. The Eighth Circuit Court of Appeals, however, decided that the Petitioner knew, or should have known, the physician's treatment was negligent on the date his leg was amputated. (App. p. 18). But such conclusion imposes a heavy burden on the Petitioner to have intimate knowledge of the art of the medical practice and to have to interpret his treatment to file a claim. Ironically, if this Eighth Circuit Court of Appeals rationale is followed, the longer a patient is treated for a medical condition the greater the risk he may

run of having his claim barred by the statutes of limitation.

This decision of the Circuit Court of Appeals also is an unfair result to the Petitioner because its result and the denial of the claim is based only on the geographical location of the medical treatment. Since McCoy was confined in the Springfield Federal Medical facility he had no freedom to seek treatment at any other location for his medical condition. It is clear from the decisions in *Otto* and *Ulrich* that if the McCoy claim had been brought in the Second or Fourth Circuit Courts of Appeal that the statutes of limitation would have been tolled and the Petitioner could have pursued his medical malpractice claim. In the Eighth Circuit, however, the Petitioner cannot because the Eighth Circuit Court of Appeals will only permit the continuing treatment doctrine to apply if the treatment is continually negligent. The inconsistent imposition of this doctrine results in an inconsistent application of the statute of limitation due to nothing more than an accident of geography.

CONCLUSION

Petitioner urges this Court to clarify the issues concerning the continuing treatment doctrine presented in this case, restore the

balance and fairness of the continuing treatment doctrine among the Circuit Courts of Appeal and respectfully request this Court to grant this Writ of Certiorari.

Respectfully submitted,

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